IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER No 62 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE B.J.SHETHNA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

VILASGIRI BHIMGIRI

Versus

VISA SRIMALI VANIK - SONI CASTE TRUST

Appearance:

1. Appeal from Order No. 62 of 2001

MR BM MANGUKIYA for Petitioner No. 1-5

MR PJ KANABAR for Respondent No. 1

CORAM : MR.JUSTICE B.J.SHETHNA

Date of decision: 30/08/2001

ORAL JUDGEMENT

The appellants have challenged in this appeal the impugned order dated 13.2.2001 passed by the learned

Assistant Judge whereby the learned Judge rejected the application for restoration of their main Regular Civil Appeal No.20 of 1990 which was dismissed for default in absence of the learned counsel for the appellants on 2.11.2000. While dismissing the said application the learned Judge has also saddled the appellants with cost of Rs.3,000/= which was ordered to be paid to the opponents.

Learned counsel Shri Mangukiya for the appellants submitted that on the facts and circumstances of the case, the learned judge was not justified in rejecting the application for restoration of his appeal. He submitted that the courts are there to do substantial justice and not technical. He submitted that the present appellants are legal heirs of Bhimgiri Bhagwan, who are cultivating the land since last 22 years. He submitted that ordinarily the appeals are restored which are dismissed for default in absence of the counsel for the appellants with or without order of costs. In reply to his application for restoration the trust filed detailed reply and objected the restoration of the main appeal. Alternatively, it was submitted that if the court is convinced to restore the appeal then the trust may be awarded cost of Rs.10,000/=. He, therefore, submitted by awarding cost of Rs.10,000/= the appeal should have been restored.

However, learned counsel Shri Kanabar for the respondent-Trust vehemently submitted that considering the averments made in the application for restoration and reasons assigned by the learned Judge while dismissing the said application this court should not interfere with the impugned order of rejection of their application for restoration of the main appeal. There is lot of substance in what is submitted by Mr.Kanabar that the appellants could have avoided certain averments made in this application for restoration of their main appeal. Such averments were not even called for. Simple prayer before the court by the appellants with folded hands to restore the appeal would have been granted by the court with or without order of costs. Having carefully gone through the detailed order passed by the learned Judge rejecting the application for restoration of the main appeal, it cannot be said that the learned Judge was wholly wrong in passing impugned order. However, the learned Judge should have kept in mind golden principle of law that justice should not have been done but it should appear to have been done. Dismissing the appeal in absence of the counsel for the appellants is permissible but not to restore by making such harsh

observations may not be good. The courts are there to do substantial justice and not technical. When there was Regular First Appeal then it was very much required to be decided on merits and it could not have been thrown out in absence of the counsel. Having dismissed the appeal in absence of the learned counsel for the appellants, the application for restoration was moved, then by awarding suitable cost learned Judge should have restored the impugned appeal.

In view of the above discussion, this appeal is allowed. The impugned order passed by the learned Judge dismissing the restoration application of the appellants to restore the main appeal with costs of Rs.3,000/= is hereby quashed and set aside. Application Ex.1 for restoration of main appeal is allowed and the impugned order dated 2.11.2000 passed by the learned Judge dismissing the appeal of the appellants in absence of their counsel is also hereby set aside. The main Regular Civil Appeal No.20 of 1990 is hereby restored to the file of the lower appellate court at its original number on the condition that the appellant shall pay cost of Rs.10,000/- to the respondent Trust within one month from today. The appeal being old one the lower appellate court is directed to decide the same on merits in accordance with law as early as possible preferably within two months from the date of the receipt of this order. It is made clear that the parties shall not ask for unnecessarily adjournments in the appeal and they shall extend their full cooperation in deciding the matter on merits as directed above. D.S. is permitted to both learned counsel for the appellant as well as respondents. Rule is made absolute.

(B.J.Shethna, J.)

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